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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1946

No. 4

ALVIN T. [illegible], as Executor, Trustee and [illegible] of the Estate of Henry C. Starr, Deceased,

Appellant,

vs.

GILBERT H. [illegible], Director of Gross Income Tax Division, Department of Treasury, State of Indiana,

Appellee.

Appeal From the Supreme Court of Indiana

APPELLEE'S MOTION FOR AFFIRMANCE AND BRIEF THEREON

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

ALMIRA G. FREEMAN, as Successor Trustee Under the Will and of the Estate of Henry C. Starr, Deceased,

Appellant,

v.

GILBERT K. HEWIT, Director of Gross Income Tax Division, Department of Treasury, State of Indiana,

Appellee.

No. 3

APPEAL FROM THE SUPREME COURT OF INDIANA

APPELLEE'S PETITION FOR REHEARING AND BRIEF THEREON

The appellee in the above entitled cause, respectfully petitions the Court to grant a rehearing in said cause for the reason that the Court erred in its opinion, decision and judgment in the following particulars, to-wit:

1. By inferentially disregarding the long established doctrine on Interstate Commerce as declared in previous

decisions of this Court upon which the various taxing laws of the several states are founded and enunciating the rule that transactions in interstate commerce are wholly immune from state taxation solely because of its being commerce of that nature and regardless of the discriminatory nature of the tax, its economic effect upon interstate commerce, or the other considerations by which this Court has sustained state taxes upon interstate commerce in the past.

2. By misconstruing the Gross Income Tax Law of Indiana as applied to this transaction in view of the legislative and judicial history of that law following the decision in *Adams Mfg. Co. v. Storen*, 304 U. S. 307, in this, that such legislative history clearly indicates that the Indiana Gross Income Tax is in reality two distinct taxes, and that the tax upon residents of the State of Indiana is an excise levied upon the local privilege of residence within the State, although measured by gross receipts, and is no longer in any sense a tax upon the transactions from which the receipts are derived.

3. In holding that this tax is a tax on the "sale" (instead of upon the receipts from sale) and that it is therefore a direct tax on commerce.

4. By discarding the rule of *mobilia sequuntur personam* in regard to this particular tax while retaining such rule as to taxes of other natures and while retaining and applying the fiction of *que facit alia facit per se.*

5. By disregarding the economic facts and practical problems of government applicable to the situation at hand and attempting to interpret the Constitution of the

United States by *a priori* reasoning, and without reference to previous cases thereby throwing the revenues of the several states into utter confusion.

6. By overlooking the provisions of the Securities and Trust Indenture Act (U.S.C.A. Title 15, No. 77 zzz, and the Securities Exchange Act), (U.S.C.A. Title 15, No. 77 bb) and the intent of Congress there expressed to occupy only a portion of the field of Securities regulation and leave the remainder of this field to the states.

WHEREFORE and for other reasons appearing in petitioner's briefs, petitioner respectfully urges that a rehearing may be granted and that the mandate of this Court may be stayed pending the disposition of this petition.

Respectfully submitted,

CLEON H. FOUST,
Attorney General,

JOHN J. MCSHANE,
JOHN H. FETTERHOFF,
LLOYD C. HUTCHINSON,
Deputies Attorney General,

Attorneys for Appellee.

STATE OF INDIANA }
MARION COUNTY } ss:

I, JOHN J. McSHANE, Deputy Attorney General, of Indianapolis, Marion County, Indiana, and attorney of record in the above cause and an attorney regularly admitted to practice in the United States Supreme Court, do certify that in my opinion the foregoing petition for rehearing in the case of Almira G. Freeman, as successor Trustee Under the Will and of the Estate of Henry C. Starr, deceased, appellant, vs. Gilbert K. Hewit, Director of Gross Income Tax Division, Department of Treasury, State of Indiana, appellee, cause numbered 3 on the dockets of this Court, is well founded and is not presented for the purpose of creating any delay. That the petition and briefs thereon are presented in all good faith and honesty.

JOHN J. McSHANE,
Deputy Attorney General.

STATE OF INDIANA }
MARION COUNTY } ss:

Subscribed and sworn to before me a Notary Public in and for said county and state this 3d day of January, 1947.

HANNAH M. McELWAINE,
Notary Public.

My Commission Expires Feby. 9, 1948.

(S E A L)

OUTLINE OF ARGUMENT

I

1. The nub of the Court's opinion is that the invalidity of the tax here involved rests on the fact that it interfers with interstate commerce without any thing more.

2. The Court thus rejects discrimination against interstate commerce as a test.

3. Likewise, the Court holds the previous test of multiplicity of taxation to be immaterial.

4. The Court equally rejects the validity of an apportioned tax.

5. Also rejected is the principle that interstate commerce must pay its way.

6. The previous decisions of this Court cannot stand against this doctrine so enunciated and the revenues of the states will be reduced to utter confusion if this doctrine prevails.

II

1. The Indiana Gross Income Tax Law levies two separate taxes:

> (a) A tax against residents of the state measured by their gross income from sources both within and without the state, with certain exceptions, but payable solely by reason of their residence.

(b) A tax against non-residents measured by their receipts from activities within the state and payable by virtue of such activities.

2. Obviously, the tax against residents is an excise upon their privilege of domicile and not upon the transactions from which the gross income is derived, as many of these transactions are not in themselves and apart from such domicile, within the taxing jurisdiction of Indiana.

3. The cases in this and the Indiana courts fully establish this distinction between the tax on residents and non-residents.

4. Therefore, assuming the premise of the court that a direct tax on interstate commerce is invalid, yet, since the Indiana tax is levied upon the local event of residence and is merely measured by gross receipts, the Court should have affirmed the decision below.

III

1. Assuming that the Court adheres to the position urged as erroneous in one (1) *supra*, yet the Indiana Gross Income Tax in the present case is valid when under the formalistic approach to which the Court would revert.

2. The Indiana Gross Income Tax is a tax imposed upon a taxable local privilege, i. e., domicile and measured by gross receipts.

3. Even under the earliest decisions of this Court in regard to gross receipts taxes this tax would not be held to be a direct tax upon interstate commerce.

4. The Indiana Gross Income Tax is not a tax upon the transactions of its residents giving rise to the income, but on the contrary attaches to gross receipts of the taxpayer independently of their source and by reason of the privilege of local residence.

5. In view of the above it is impossible to see how the tax can be a "levy upon the very process of commerce", since the processes of commerce have already completely transpired before the tax can be levied and the tax is levied upon the gross receipts for the privilege of domicile.

6. Therefore the Court erred in holding it to be a tax upon the sale.

IV

1. In holding that Indiana's power to tax the gross income or gross receipts from these transactions is not affected by the fact that the domicile of the seller or the situs of the securities prior to conclusion of the sales was in Indiana, and in holding that the domicile and situs do not have a material effect upon the application of the Gross Income Tax Act.

2. This disregard of the rule of *mobilia sequuntur personam* for this one purpose only, is wholly inconsistent with this Court's previous decisions in all other fields of taxation; in its decisions in regard to business situs; and in its decisions in many other branches of the law.

V

1. The resultant affects of this decision as to a practical administration.

2. The loss of revenue to the state and other states as a result of this opinion.

3. Some observations in regard to the sale and transfer of stocks, bonds and other securities on the New York Stock Exchange.

4. A consideration of the National Marketing idea in relation to the sale of stocks and bonds.

VI

1. The Court's apparent failure, in its opinion, to consider the application of the Securities Act and the Act governing Securities Exchanges.

2. Conclusion.

ARGUMENT

I

It would be presumptuous for the appellee to repeat the suggestions outlined in the concurring opinion of the Court of the primary premise of the majority opinion in this cause, which is, or at least appears to be, that interstate commerce transactions are completely free from state taxation by any state regardless of whether such state tax discriminates against interstate commerce; regardless as to whether there is any actual or potential danger of a multiplicity of taxation by different states, and regardless of whether there is an apportionment of the tax. If this statement of the Court be taken at its face value, then all references by the Court in the decisions from *J. D. Adams Mfg. Co. v. Storen* (1938), 304 U. S. 307, to date, in regard to multiplicity of taxation, discrimination against interstate commerce, and apportionment of taxation between states, must be wholly disregarded as immaterial and irrelevant.

All statements by this Court in the last ten years to the effect that interstate commerce must pay its own way become empty syllogisms. The many state taxes which are founded upon the principle of equality of treatment between intrastate and interstate commerce must be drastically revised in order to impose a heavier burden upon intrastate commerce so that sufficient revenue will be obtained for the discharge of the state's functions.

It may be that the Court did not intend to state so drastic a revision of constitutional doctrine as the appellee here

represents to be the opinion of the Court. However, to those who cannot search the minds of the Court, this would appear to be the most reasonable interpretation to be placed upon the opinion. Meanwhile, this lack of clarity in the opinion, will undoubtedly result in the loss of millions of dollars of state revenue and the expenditure of hundreds of thousands of dollars in litigation expense before the correct interpretation of the Court's opinion can be established.

The Appellee respectfully urges the Court to delay its mandate, the effect of which, will jeopardize the revenues and financial stability of the States until upon re-hearing it may be fully and further advised of the wide latitude and effect of the present opinion and the inherent errors therein.

II

The Court in its majority opinion relied for an interpretation of the Indiana Gross Income Tax Law, on the case of *Adams Mfg. Co. v. Storen, supra* (1938), 304 U. S. 307, where the Court characterized the tax upon the examination of the original Indiana Gross Income Tax Law, adopted in 1933, without the benefit of definite judicial interpretations and applications of that law and without reference to the amendment of that law in 1937.

The appellee would further call the Court's attention to the fact that the Gross Income Tax Law provides for two separate and distinct taxes levied upon different bases. By Sec. 2 of the act, the tax is specifically levied upon the entire gross income of all residents of the State of Indiana,

but as to non-residents it is levied upon the gross income derived from activities or businesses or any other source within the state. An example of the radical difference between these two taxes is obtained by the comparison of the class of the decisions of the Indiana Supreme Court in the cases of *Department of Treasury v. International Harvester Co.* (1943), 221 Ind. 416, (decision based on 1937 Act); and the *Department of Treasury v. Allied Mills, Inc.* (1942), 220 Ind. 340, (decision based on 1933 Act). In the former case, the Class "A" sales of the taxpayer which constitute all sales solicited in Indiana by a non-resident taxpayer but shipped into the state from an out-of-state branch, were held not to be within the purview of the Indiana statute. In the latter case, it was affirmed by this Court the gross receipts from the identical type of sale made by an out-of-state branch of a resident corporation of Indiana, were held taxable, the only distinction between the cases being that in one instance the corporation was a domestic corporation and in the other instance a foreign corporation.

The tax was not, therefore, levied upon the sales for the sales were in each instance identical. The domestic corporation paid the tax solely by reason of the fact that it enjoyed the privilege of domicile in Indiana, and the right to make receipt of Gross Income in Indiana. Other illustrations of the same point could be multiplied, and examples furnished. We would call the attention of the Court to but a few. An Indiana resident is taxed upon wages and salaries earned and received in a foreign state not because Indiana has authority to tax the act of earning a salary, or the payment of salary in another state, but because In-

diana has authority to tax its residents upon their privilege of domicile. Likewise, Indiana levies its tax upon a taxpayer consummating a local business transaction in another state not because it may tax a business transaction occurring in the other state, but because of its ability to tax its residents by virtue of their domicile, and right to receive gross income.

Therefore, if a direct tax upon interstate commerce is invalid, it necessarily follows that a tax upon a local event would be valid, then insistence is made that the Indiana tax was valid for it is in no sense a direct tax upon interstate commerce. It is a tax upon a resident of Indiana for the exercise of his local privilege of domicile, which, in that sense is similar to the tax in *American Mfg. Co. v. St. Louis,* 250 U. S. 459 (1919), which is measured by the gross receipts of the taxpayer.

The case at bar is a shining example of the local privileges which are thus taxed. The appellant derives his existence and all of his powers as a Trustee by virtue of the laws of the State of Indiana. That, then, is *quid pro quo,* for which the appellant pays his tax. Certainly, the creature of the state is not a "frankenstein" who, upon his creation, passes beyond the power of the state to control and regulate. The state may here forbid its Trustee from trafficking in corporate securities, whether intrastate or interstate commerce. It may so classify the securities in which the Trustee may invest as to exclude stocks and bonds issued by foreign corporations. All of the actions of the Trustee are subject to the orders and approval of the Court under whose jurisdiction this Trustee serves. Yet this

Court holds that the state may not exercise the lesser power of permitting such investment under the lesser regulation created by its tax. Such power to forbid traffic in corporate securities to its Trustees entirely would not rest upon any power of the state to regulate the interstate traffic in securities, but would rest rather upon its control over a local Trustee by reason of the local domicile of the trust. The power to tax rests upon the same basis and resting upon that basis is not and does not purport to be a regulation of interstate commerce as such.

Therefore, assuming the premise of the Court that a direct tax on interstate commerce is invalid, then the Indiana tax levied upon the local event of residence by the appellant within the state and measured by the gross receipts, should have been affirmed in the decision below.

III.

From the earliest decisions of this Court it has been held that where a tax is levied upon a privilege of local domicile, the tax may be measured by the taxpayer's income, computed on either gross or net basis, even though such income be derived in part from interstate commerce, thus in *State Tax on Railway Gross Receipts* (1873), 15 Wall. 284, a state tax levied upon the privilege of local domicile, was held valid, for the reason, among others, that the privilege of local domicile would support it even though included in measure of the tax were the gross receipts from both intrastate and interstate transportation. See *Lockhart, Gross Tax Receipts on Interstate Transportation and Communication,* 42 Harvard Law Review, pp. 44 to 47.

The rationale of this early decision is sound for the reason that the right to receive income, whether gross or net, is one of the privileges of local domicile as is the right to manufacture within the state is a local privilege as held in *American Manufacturing Co. v. St. Louis* (1919), 250 U. S. 459.

Insofar, therefore, as the tax is levied against residents of Indiana, it is levied upon the entire local domiciliary privilege of receiving income. In this respect a distinction between gross income and net income would be a matter of degree only. What deductions from gross income would be essential to convert the tax from a gross income tax to a net income tax? Would a state be required to permit the deduction of every item of expense to accomplish this conversion? The appellee is forced to the conclusion that the Court, in asserting this tax to be an imposition upon the very processes of commerce between the states, misunderstood the scope and application of the tax and relied entirely upon the statement in the *Adams* case in regard to the gross income tax law before its amendment and prior to extensive judicial history or practical application had been made. The Court also apparently adopted an erroneous conception of the nature of the application of the Indiana Gross Income Tax law in that the Court apparently catalogued it as a tax upon the *sale*, or *act of selling* the securities in this case. However, this tax is unlike a sales tax or a tax upon the act of sale, wherein the tax would apply when the sale was made whether payment was received then or never.

The gross income tax as to residents of Indiana attaches to receipts from sales only *if, when and after receipts are* received by the seller.

The tax is imposed, not for the privilege of making the sale, but for the domiciliary privilege of receiving money from the sale. The liability for tax arises *when payment is received* and when interstate processes and out-of-state processes *have been completed and come to an end.* It cannot be actually said then that this tax is either levied upon, or conditioned upon, or is a direct burden upon the sale or other transaction giving rise to the income, or that the necessity arises for an apportionment.

It may perhaps be said that the tax indirectly affects and possibly indirectly burdens interstate or out-of-state commerce, but such indirect burden arises solely because this tax upon the local domiciliary privilege of receiving gross income attaches to the result of interstate commerce but not to its process.

This tax is not discriminatory. It is levied uniformly and indiscriminately upon all receipts. It does not single out interstate commerce receipts or any other receipts for imposition. It attempts only to provide that interstate commerce shall bear a fair share of the cost of the local government whose protection it enjoys and the same share of the cost of government borne by intrastate commerce.

Therefore, this case falls within the *Railway Gross Receipts* case, *supra,* as a tax upon a taxable privilege (domiciliary privilege of receiving income) even though the measure of the tax be the receipts themselves and such re-

ceipts had their origin in interstate commerce. This case has not been overruled as to this point although it has been distinguished and if the Court intends to return to the doctrines of 1873, it should at least make application of those doctrines in a consistent and logical manner so as not to extend restrictions beyond those enunciated by this Court at an early date.

IV

In holding that the domicile of the seller and that the situs of these intangibles prior to sale in no way had a material effect upon the application of this tax and in rejecting the maxim of "*mobilia sequuntur personam*", the Court will compel a complete reapplication of not only the tax laws of the state, and the entire nation, but also many other laws.

The rule of "*mobilia sequuntur personam*" has been observed for so long and it has become so deeply rooted in the law of the land that it has become basic. The rule has been recognized heretofore by the Court and has not to our knowledge been changed until now. It has been accepted as a contra situs to business situs in the Court's "business situs" decisions. This Court has apparently discarded the rule in regard to this particular tax while retaining such rule as to taxes of other types and while retaining the fiction of "*que facit per alia facit per se.*"

We respectfully suggest that while the Court calls it a "fiction" in this case, yet in *Curry v. McCanless* (1939), 307 U. S. 357, 366, the Court stated that "it cannot be dissociated from the persons from whose relationship they

are derived. These are not in any sense fictions. They are indispensable realities".

It is inconceivable that the Court can deem the "*mobilia sequuntur personam*" doctrine to be a mere fiction which it may lightly toss aside in a particular case to accomplish a particular result without causing serious repercussions in other cases of entirely different nature. For example, this case is a case involving a particular type of transfer of securities in which interstate transportation of the securities occurred as an incident to the transfer. Transfer by inheritance is another type of transfer of securities wherein interstate transportation of the certificates to the issuing corporation or its stock registrar commonly occurs as a means of affecting and evidencing the transfer. If a transfer by sale is interdicted by reason of the interstate transportation of the certificates, would not a transfer by inheritance accomplished through a like transportation be equally interdicted? It needs no great flight of the imagination to conjure various and sundry other propositions of like nature in regard to their taxes on other types of property and even entirely different legal situations where this Court will be asked again, again and again to toss aside not only this particular so-called fiction, but others as well which are equally well established in the law. A sale of real property located within the State may be consummated by means of interstate commerce and the actual sale may occur by means of interstate transmission of the documents of title as occurred in this case. Will this Court there disregard the local situs of real property for property and inheritance tax purposes in order to hold the gross receipts from such a sale to be exempt? What end can

there be to the course upon which this Court has embarked? What is our destination and what preparation can the states make for this uncharted voyage into the unknown? Certainly the states as sovereign members of this federation and as partners to the Constitution of the United States, should have some guide by which they can chart their financial course. This Court after solemnly proclaiming that the *mobilia* doctrine is not a fiction but is an indisputable reality, should not so lightly toss it aside.

V

If the appellee is incorrect in the interpretation of this Court's opinion in drawing the conclusion therefrom that the Court is returning to the empty formalism expressed in its earliest decisions, such error is a result of the language of the opinion and the appellee can feel only that it is not, by any means, alone in giving such interpretation to the Court's opinion. The volume of personal calls, telegraph messages and correspondence received by the Indiana Gross Income Tax Division since this opinion was handed down is abundant evidence of a general conception throughout the country that the Court in its opinion swept away the rationale of the decisions of the last ten years in the field of state taxation. It is clearly indicated that a volume of litigation can be expected from this opinion and the construction generally placed upon it will be phenomenal. The opinion by its lack of clarity and its adoption of a new rationale for the determination of state tax cases, invites a myriad of actions to determine tax liability in a multitude of situations where it had been confidently assumed by both the taxing authorities and the taxpayers

that such litigation was foreclosed by previous decisions of this Court in which the doctrines governing taxability were well established.

The appellee does not desire to be unduly critical of the language of the Court nor to cavil at minor inconsistencies or obscurities, but the fact remains that the tax laws of the State of Indiana and other forty-seven states comprising this nation, cannot be successfully administered when the hint of a major change in doctrine is obscure and the basis for such change of doctrine is not stated by the Court. The appellee would respectfully urge upon the Court that in the last ten years this Court has done much in behalf of its tax cases in its other opinions upon the Commerce Clause to bring about an adjustment between the jurisdiction of the federal and state governments upon the basis of a particular regard for the equity, sovereignty and the necessities of each. The Court, in this period, has put the breath of actual experience into the Commerce Clause and thus brought it to life. In its opinion in this case, however, the Court has disregarded this particular adjustment between the correlative powers of the state and the federal government. Let us look at these transactions as they are ordinarily and commonly regarded in the law and in the actual experience of the parties.

When the appellant offered the securities for sale, upon acceptance, assignment and deposit in the mails, the sale, so far as he was concerned, was complete and both parties were bound. *Rule 116 New York Stock Exchange, Corporation Law No. 10.* IN RE: *McCafferty's Will*, 264 N. Y. S. 38, 14 C. J. 1033, 1050, 7 R. C. L. 239, 243, 245.

The deposit of the securities in the mails by the Trustee constituted delivery.

Howbert v. Penrose, 38 F. (2) 577, 579, 68 A. L. R. 820.

Stock certificates are merely evidence of the ownership of shares or the aliquot part of the holders interest in the stock. They are not the stock itself. Certificates of stock and shares of stock are different legal entities.

14 C. J. 506, 509;
Bombal v. People State Bank of Ramsey, 10 N.E. (2) 651, 653, 367 Ill 113.

Shares of stock and certificates for shares of stock are different legal entities. 14 C. J. 506, 509.

A certificate of stock is merely the symbol or paper evidence of the ownership of shares or of the aliquot part of the holders ownership in the stock. They are not the stock itself,

Bombal v. Peoples State Bank of Ramsey, 10 N.E. (2) 651, 367 Ill. 113.

and while the stock certificates were transmitted to the purchaser, after purchase, the shares of stock or the debt evidenced by the banks remained undisturbed, except as to the passing of the title. The securities that were transmitted through the mails therefore were not those of the Trustee, but belonged to the purchaser, thus constituting a specie of delivery.

These statements, supported by the authorities, correspond with the actual conception of the party. When the appellant dealt with his local broker, he dealt with an independent marketing organization, or agency, located in the State of Indiana. He cared not to whom or by what means the transaction was closed so long as he obtained a price determined by reference to sales made in the City of New York. For certain legal purposes and by reason of the historical origin and development of the stock market, the local broker, and even the New York broker, whom the appellant may never have met and whose identity might have been wholly unknown to the appellant, are considered as agents of the appellant.

There is no showing made nor reference given as to the identity or residence of the purchasers in the opinion as would be pertinent in the application of the rule handed down in the *Allied Mills* case.

The Court gave no importance to the domicile of the purchaser merely assuming that because the transaction was handled on the New York Stock Exchange, it was a process of interstate commerce.

By disregarding the pragmatic approach of the Court in its opinions of the last ten years, the Court has disrupted the functions of the states and has concentrated the only possible taxing power in those few states which have securities exchanges. At least, the Court has left standing without comment, the only case concerning the right of a state to tax the sale of securities.

O'Kane v. State (1940) 28 N.E. (2d) 905.

It is certainly not a pragmatic approach to permit a few states having the focus of a national market located within their borders to levy tribute upon the receipts of every state dealing with that national security and into which that market extends, all in derogation of the right of the other states to tax their local residents upon the domiciliary privilege of receiving gross income. If the market be truly a national interstate market, it extends as well, into the State of Indiana and is as much there located as in any other state.

It is vital that the appellee be given the opportunity of re-presenting this case to the Court with a view of a reversal of its majority opinion.

VI

The acts of Congress relating to securities and securities exchanges have been overlooked in this case and the history of such exchanges in relation to the Commerce Clause has not been mentioned. Congressional power over the market for the sale of cattle was first denied by this Court on the ground that such market did not constitute interstate commerce. Thereafter, the Congressional Act regulating such a market was sustained on the doctrine, not that it was interstate commerce but that it affected interstate commerce. This decision may be extended by anology to the stock exchange.

Pursuant to the power so established, the Congress enacted the Securities Act, which is titled 15 U.S.C.A. Sec. 77 zzz, providing:

> "* * * nor shall anything in this subchapter affect the jurisdiction of any other commission, board, agency, or officer of the United States or of any State or political subdivision of any State, over any person or security, insofar as such jurisdiction does not conflict with any provisions of this subchapter or any rule, regulation, or order thereunder."

Congress also, in its regulation of Securities Exchanges (U.S.C.A. Title 15, Sec. 78 bb) provided:

> "* * * Nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder."

These paragraphs clearly evidence an intent by Congress not to assume exclusive jurisdiction over the regulation of interstate commerce in securities, but rather to leave with the states full power to regulate such interstate commerce and securities to the full extent that Congress did not act.

Since state taxation is only invalid when it amounts to a *regulation*[1] of interstate commerce and since Congress has expressly disclaimed exclusive jurisdiction over that commerce, it must be interpreted that Congress has acceded to the state regulations under either the policy or taxing power except as such regulation contravenes congressional provisions. Let it be known that Congress

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[1] Constitution of U. S. Art. 1, Sec. 8 (3).

did not grant certain specific rights of regulation to the States, but rather left it with the states.

Therefore, it is submitted that the tax in this case might well be sustained upon the basis of Congressional consent and Congressional action in like manner as the tax was sustained in *Prudential Ins. Co. v. Benjamin* (1946), — U. S. —. (Supreme Court Reporter advance sheet, Vol. 66, No. 17—7-1-46.)

For the above and foregoing reasons, the appellee prays that its petition for a rehearing in this case be granted.

Respectfully submitted,

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JOHN H. FETTERHOFF,
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Frankfurter } p. 2.
Rutledge } pp. 1, 2, 9, 11, 12, 20, 23, 24, 25,

SUPREME COURT OF THE UNITED STATES

No. 3.—October Term, 1946.

Almira G. Freeman, as successor, Trustee Under the Will and of the Estate of Henry C. Starr, Deceased, Appellant, v. Gilbert K. Hewit, Director of Gross Income Tax Division, Department of Treasury, State of Indiana.	Appeal from the Supreme Court of the State of Indiana.

[December 16, 1946.]

Mr. Justice Frankfurter delivered the opinion of the Court.

This case presents another phase of the Indiana Gross Income Tax Act of 1933, which has been before this Court in a series of cases beginning with *Adams Mfg. Co.* v. *Storen*, 304 U. S. 307. The Act imposes a tax upon "the receipt of the entire gross income" of residents and domiciliaries of Indiana but excepts from its scope "such gross income as is derived from business conducted in commerce between this state and other states of the United States . . . to the extent to which the State of Indiana is prohibited from taxing such gross income by the Constitution of the United States." Indiana Laws 1933, p. 388, 392, as amended, Laws 1937, p. 615, Burns' Ind. Stat. Anno. § 64–2601 *et seq.*

Appellant's predecessor, domiciled in Indiana, was trustee of an estate created by the will of a decedent domiciled in Indiana at the time of his death. During 1940, the trustee instructed his Indiana broker to arrange for the sale at stated prices of securities forming part of the trust estate. Through the broker's New York correspondents the securi-

ties were offered for sale on the New York Stock Exchange. When a purchaser was found, the New York brokers notified the Indiana broker who in turn informed the trustee, and the latter brought the securities to his broker for mailing to New York. Upon their delivery to the purchasers, the New York brokers received the purchase price, which, after deducting expenses and commission, they transmitted to the Indiana broker. The latter delivered the proceeds less his commission to the trustee. On the gross receipts of these sales, amounting to $65,214.20, Indiana, under the Act of 1933, imposed a tax of 1%. Having paid the tax under protest, the trustee brought this suit for its recovery. The Supreme Court of Indiana, reversing a court of first instance, sustained the tax on the ground that the *situs* of the securities was in Indiana. 221 Ind. 675, 51 N. E. (2d) 6. The case is here on appeal under § 237 (a) of the Judicial Code, 28 U. S. C. 344 (a), and has had the consideration which two arguments afford.

The power of the States to tax and the limitations upon that power imposed by the Commerce Clause have necessitated a long, continuous process of judicial adjustment. The need for such adjustment is inherent in a federal government like ours, where the same transaction has aspects that may concern the interests and involve the authority of both the central government and of the constituent States.[1]

[1] Compare Report of the [Australian] Royal Commission on the Constitution (1929) pp. 260, 322–24, and Report of the [Canadian] Royal Commission on Dominion-Provincial Relations (1940), bk. II, pp. 62–67, 111–21, 150–62, 216–19. See Australia, Act No. 1, 1946, repealing Act No. 20, 1942, and Act No. 43, 1942; *South Australia v. Commonwealth*, 65 C. L. R. 373; also Proposals of the Government of Canada, Dominion-Provincial Conference on Reconstruction pp. 47–49; Proceedings of the Dominion-Provincial Conference (1945) *passim*, particularly the statement of Prime Minister Mackenzie King, p. 388, and the discussion following. And see Maxwell, The Fiscal Impact of Federalism in the United States (1946) cc II, XIII, XIV.

The history of this problem is spread over hundreds of volumes of our Reports. To attempt to harmonize all that has been said in the past would neither clarify what has gone before nor guide the future. Suffice it to say that especially in this field opinions must be read in the setting of the particular cases and as the product of preoccupation with their special facts.

Our starting point is clear. In two recent cases we applied the principle that the Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the States, but by its own force created an area of trade free from interference by the States. In short, the Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States. *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761; *Morgan* v. *Virginia*, 328 U. S. —. In so deciding we reaffirmed, upon fullest consideration, the course of adjudication unbroken through the Nation's history. This limitation on State power, as the *Morgan* case so well illustrates, does not merely forbid a State to single out interstate commerce for hostile action. A State is also precluded from taking any action which may fairly be deemed to have the effect of impeding the free flow of trade between States. It is immaterial that local commerce is subjected to a similar encumbrance. It may commend itself to a State to encourage a pastoral instead of an industrial society. That is its concern and its privilege. But to compare a State's treatment of its local trade with the exertion of its authority against commerce in the national domain is to compare incomparables.

These principles of limitation on State power apply to all State policy no matter what State interest gives rise to its legislation. A burden on interstate commerce is none the lighter and no less objectionable because it is imposed by a State under the taxing power rather

than under manifestations of police power in the conventional sense. But, in the necessary accommodation between local needs and the overriding requirement of freedom for the national commerce, the incidence of a particular type of State action may throw the balance in support of the local need because interference with the national interest is remote or unsubstantial. A police regulation of local aspects of interstate commerce is a power often essential to a State in safeguarding vital local interests. At least until Congress chooses to enact a nation-wide rule, the power will not be denied to the State. *The Minnesota Rate Cases*, 230 U. S. 352, 402 *et seq.*; *S. C. Hwy. Dept.* v. *Barnwell Bros.*, 303 U. S. 177; *Union Brokerage Co.* v. *Jensen*, 322 U. S. 202, 209–12. State taxation falling on interstate commerce, on the other hand, can only be justified as designed to make such commerce bear a fair share of the cost of the local government whose protection it enjoys. But revenue serves as well no matter what its source. To deny to a State a particular source of income because it taxes the very process of interstate commerce does not impose a crippling limitation on a State's ability to carry on its local function. Moreover, the burden on interstate commerce involved in a direct tax upon it is inherently greater, certainly less uncertain in its consequences, than results from the usual police regulations. The power to tax is a dominant power over commerce. Because the greater or more threatening burden of a direct tax on commerce is coupled with the lesser need to a State of a particular source of revenue, attempts at such taxation have always been more carefully scrutinized and more consistently resisted than police power regulations of aspects of such commerce. The task of scrutinizing is a task of drawing lines. This is the historic duty of the Court so long as Congress does not undertake to make specific arrangements between the national government and

the States in regard to revenues from interstate commerce. See Act of July 3, 1944, 58 Stat. 723; H. Doc. 141, 79th Cong., 1st Sess., "Multiple Taxation of Air Commerce"; and compare 54 Stat. 1059, 4 U. S. C. § 13 *et seq.* (permission to States to extend taxing power to Federal areas). Considerations of proximity and degree are here, as so often in the law, decisive.

It has been suggested that such a tax is valid when a similar tax is placed on local trade, and a specious appearance of fairness is sought to be imparted by the argument that interstate commerce should not be favored at the expense of local trade. So to argue is to disregard the life of the Commerce Clause. Of course a State is not required to give active advantage to interstate trade. But it cannot aim to control that trade even though it desires to control its own. It cannot justify what amounts to a levy upon the very process of commerce across States lines by pointing to a similar hobble on its local trade. It is true that the existence of a tax on its local commerce detracts from the deterrent effect of a tax on interstate commerce to the extent that it removes the temptation to sell the goods locally. But the fact of such a tax, in any event, puts impediments upon the currents of commerce across the State line, while the aim of the Commerce Clause was precisely to prevent States from exacting toll from those engaged in national commerce. The Commerce Clause does not involve an exercise in the logic of empty categories. It operates within the framework of our federal scheme and with due regard to the national experience reflected by the decisions of this Court, even though the terms in which these decisions have been cast may have varied. Language alters, and there is a fashion in judicial writing as in other things.

This case, like *Adams Mfg. Co.* v. *Storen*, *supra*, involves a tax imposed by the State of the seller on the proceeds of interstate sales. To extract a fair tithe

from interstate commerce for the local protection afforded to it, a seller State need not impose the kind of tax which Indiana here levied. As a practical matter, it can make such commerce pay its way, as the phrase runs, apart from taxing the very sale. Thus, it can tax local manufacture even if the products are destined for other States. For some purposes, manufacture and the shipment of its products beyond a State may be looked upon as an integral transaction. But when accommodation must be made between state and national interests, manufacture within a State, though destined for shipment outside, is not a seamless web so as to prevent a State from giving the manufacturing part detached relevance for purposes of local taxation. *American Mfg. Co.* v. *St. Louis*, 250 U. S. 459; *Utah Power & L. Co.* v. *Pfost*, 286 U. S. 165. It can impose license taxes on domestic and foreign corporations who would do business in the State, *Cheney Brothers Co.* v. *Massachusetts*, 246 U. S. 147; *St. Louis S. W. Ry.* v. *Arkansas*, 235 U. S. 350, 364, though it cannot, even under the guise of such taxes, "hamper" interstate commerce. *Western Union Tel. Co.* v. *Kansas*, 216 U. S. 1; *Pullman Co.* v. *Kansas*, 216 U. S. 56 (particularly White, J. concurring at p. 63); Henderson, The Position of Foreign Corporations in American Constitutional Law (1918) 118–23, 128–31. It can tax the privilege of residence in the State and measure the privilege by net income, including that derived from interstate commerce. *U. S. Glue Co.* v. *Oak Creek*, 247 U. S. 321; *cf. Atlantic Coast Line* v. *Daughton*, 262 U. S. 413. And where, as in this case, the commodities subsequently sold interstate are securities, they can be reached by a property tax by the State of domicil of the owner. *Virginia* v. *Imperial Sales Co.*, 293 U. S. 15, 19; and see *Citizens National Bank* v. *Durr*, 257 U. S. 99.

These illustrative instances show that a seller State has various means of obtaining legitimate contribution to the

costs of its government, without imposing a direct tax on interstate sales. While these permitted taxes may, in an ultimate sense, come out of interstate commerce, they are not, as would be a tax on gross receipts, a direct imposition on that very freedom of commercial flow which for more than a hundred and fifty years has been the ward of the Commerce Clause.

It is suggested, however, that the validity of a gross sales tax should depend on whether another State has also sought to impose its burden on the transactions. If another State has taxed the same interstate transaction, the burdensome consequences to interstate trade are undeniable. But that, for the time being, only one State has taxed is irrelevant to the kind of freedom of trade which the Commerce Clause generated. The immunities implicit in the Commerce Clause and the potential taxing power of a State can hardly be made to depend, in the world of practical affairs, on the shifting incidence of the varying tax laws of the various States at a particular moment. Courts are not possessed of instruments of determination so delicate as to enable them to weigh the various factors in a complicated economic setting which, as to an isolated application of a State tax, might mitigate the obvious burden generally created by a direct tax on commerce. Nor is there any warrant in the constitutional principles heretofore applied by this Court to support the notion that a State may be allowed one single-tax-worth of direct interference with the free flow of commerce. An exaction by a State from interstate commerce falls not because of a proven increase in the cost of the product. What makes the tax invalid is the fact that there is interference by a State with the freedom of interstate commerce. Such a tax by the seller State alone must be judged burdensome in the context of the circumstances in which the tax takes effect. Trade being a sensitive plant, a direct tax upon it to some extent at least

deters trade even if its effect is not precisely calculable. Many States, for instance, impose taxes on the consumption of goods and such taxes have been sustained regardless of the extra-State origin of the goods, or whether a tax on their sale had been imposed by the seller State. Such potential taxation by consumer States is but one factor pointing to the deterrent effect on commerce by a superimposed gross receipts tax.

It has been urged that the force of the decision in the *Adams* case has been sapped by *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33. The decision in *McGoldrick* v. *Berwind-White* was found not to impinge upon "the rationale of the *Adams Manufacturing Co.* case," and the tax was sustained because it was "conditioned upon a local activity, delivery of goods within the State upon their purchase for consumption." *309 U. S. at 58. Compare McLeod* v. *Dilworth Co.*, 322 U. S. 327. Taxes which have the same effect as consumption taxes are properly differentiated from a direct imposition on interstate commerce, such as was before the Court in the *Adams* case and is now before us. The tax on the sale itself cannot be differentiated from a direct unapportioned tax on gross receipts which has been definitely held beyond the State taxing power ever since *Fargo* v. *Michigan*, 121 U. S. 230, and *Philadelphia Steamship Co.* v. *Pennsylvania*, 122 U. S. 326. See also, *e. g.*, *Galveston, Harrisburg Ry. Co.* v. *Texas*, 210 U. S. 217; *Kansas City Ry.* v. *Kansas*, 240 U. S. 227, 231; *Puget Sound Co.* v. *Tax Commission*, 302 U. S. 90, 94; and compare *Wallace* v. *Hines*, 253 U. S. 66. For not even an "internal regulation" by a State will be allowed if it directly affects interstate commerce. *Robbins* v. *Shelby Taxing District*, 120 U. S. 489, 494.

Nor is *American Mfg. Co.* v. *St. Louis*, 250 U. S. 459, or *Harvester Co.* v. *Dept. of Treasury*, 322 U. S. 340, any justification for the present tax. The *American Mfg. Co.* case involved an imposition by St. Louis of a license

fee upon the conduct of manufacturing within that city. It has long been settled that a State can levy such an occupation tax graduated according to the volume of manufacture. In that case, to lighten the manufacturer's burden, the imposition of the occupation tax was made contingent upon the actual sale of the goods locally manufactured. Sales in St. Louis of goods made elsewhere were not taken into account in measuring the license fee. That tax, then, unlike this, was not in fact a tax on gross receipts. Cf. *Cornell* v. *Coyne*, 192 U. S. 418. And, if words are to correspond to things, the tax now here is not "a tax on the transfer of property" within the State, which was the basis for sustaining the tax in *Harvester Co.* v. *Dept of Treasury, supra*, at 348.

There remains only the claim that an interstate sale of intangibles differs from an interstate sale of tangibles in respects material to the issue in this case. It was by this distinction that the Supreme Court of Indiana sought to escape the authority of *Adams Mfg. Co.* v. *Storen, supra*. Latin tags like *mobilia sequuntur personam* often do service for legal analysis, but they ought not to confound constitutional issues. What Mr. Justice Holmes said about that phrase is relevant here. "It is a fiction, the historical origin of which is familiar to scholars, and it is this fiction that gives whatever meaning it has to the saying *mobilia sequuntur personam*. But being a fiction it is not allowed to obscure the facts, when the facts become important." *Blackstone* v. *Miller*, 188 U. S. 189, 204. Of course this is an interstate sale. And constitutionally it is commerce no less and no different because the subject was pieces of paper worth $65,214.20, rather than machines.

Reversed.

MR. JUSTICE BLACK dissents.

SUPREME COURT OF THE UNITED STATES

No. 3.—October Term, 1946.

Almira G. Freeman, as successor, Trustee Under the Will and of the Estate of Henry C. Starr, Deceased, Appellant, v. Gilbert K. Hewit, Director of Gross Income Tax Division, Department of Treasury, State of Indiana.	Appeal from the Supreme Court of the State of Indiana.

[December 16, 1946.]

Mr. Justice Rutledge, concurring.

This is a case in which the grounding of the decision is more important than the decision itself. Whether the Court now intends simply to qualify or to repudiate entirely, except in result, *Adams Mfg. Co.* v. *Storen*, 304 U. S. 307, I am unable to determine from its opinion. But that one or the other consequence is intended seems obvious from its refusal to rest the present decision squarely on that case, together with the wholly different foundation on which it now relies. In either event, the matter is of large importance and calls for discussion.

I

The *Adams* case held the Indiana tax now in issue to be invalid when applied, *without apportionment*, to gross receipts derived from interstate sales of goods made by Indiana manufacturers who sold and shipped them to purchasers in other states. "The vice of the statute" as thus applied, it was held, was "that the tax includes in its measure, *without apportionment*, receipts derived from activities in interstate commerce; and that the exaction is of such a character that if lawful it may in substance be laid *to the fullest extent* by States in which the goods are sold as well as those in which they are manufactured. Inter-

state commerce would thus be subjected to *the risk of a double tax burden* to which intrastate commerce is not exposed, and which the commerce clause forbids." (Emphasis added.) 304 U. S. 307, 311.[1]

Today's opinion refuses to rest squarely on the *Adams* case, although that case would be completely controlling if no change in the law were intended. No basis for distinguishing the cases on the facts or the ultimate questions is found or stated. The Court takes them as identical.[2] Yet ~~the Court~~ places no emphasis upon apportionment, the absence of which the *Adams* opinion ~~regarded as~~ crucial. The Court also puts to one side as irrelevant the factor there most stressed, namely, the danger of multiple taxation, that is, of similar taxation by other states, if the Indiana tax should be upheld in the attempted application.

Those matters were the very essence of the *Adams* decision. They were in its words "the vice" of the statute as applied. The *Adams* opinion gives no reason for believing that the application of the tax would not have been sustained if either of the two elements vitiating it had been absent. On the contrary, the fair, indeed the necessary, inference from the language and reasons given is that the

[1] The Court added: "We have repeatedly held that such a tax is a regulation of, and a burden upon, interstate commerce prohibited by Article I, § 8 of the Constitution. The opinion of the State Supreme Court stresses the generality and nondiscriminatory character of the exaction, but it is settled that this will not save the tax if it directly burdens interstate commerce." 304 U. S. 307, 311–312. Cf. notes 5 and 16.

[2] The only factual difference is that here the sales were of securities, there of goods. It was this upon which Indiana has relied to distinguish the *Adams* case, asserting originally that it gave domiciliary foundation for sustaining the tax. This claim disappeared, in effect, at the second oral argument, and the Court does not rest on it. I agree that, for present purposes, sales of intangibles should be treated identically with sales of goods.

tax would not have been voided if there had been no danger of multiple state taxation or if the tax had been apportioned so as to eliminaate that risk. Moreover those groundings were strictly in accord with long lines of previous decisions rendered here,[3] were intended to conform to them and to preserve them unimpaired.

Yet now they are put to one side; either as irrelevant or as not controlling and therefore presumably as insufficient,[4] in favor of another rationalization which ignores them completely. Shortly, this is, in reiterated forms, that the tax as applied is laid "directly on" interstate commerce, is a levy "on the very sale" or "the very process" of such commerce, is therefore and solely thereby a "burden" on it, and consequently is an exaction the commerce clause forbids. What outlaws it is neither comparative disadvantage with local trade nor any actual or probable clogging or impeding effect in fact.[5] It is simply the "direct" bearing and "incidence" of the tax on interstate commerce and this alone. Stripped of any discriminatory element and of any actual or probable tendency to block or impede the commerce in fact, this "direct incidence" is itself enough without more to invalidate the tax, although it is one of general application singling out the commerce neither for separate nor for distinct or invidious treatment.

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[3] See, *e. g. Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18; *Cudahy Packing Co.* v. *Minnesota*, 246 U. S. 450; *U. S. Express Co.* v. *Minnesota*, 223 U. S. 335. And see especially discussion in *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, 255–257.

[4] Compare the opinion of MR. JUSTICE FRANKFURTER in *Northwest Airlines* v. *Minnesota*, 322 U. S. 292.

[5] As the Court says, "An exaction by a State from interstate commerce falls not because of a proven increase in the cost of the product. What makes the tax invalid is the fact that there is interference by a State with the freedom of interstate commerce." The only "interference" held to be important is the direct incidence of the tax on the commerce, not the double burden or risk of it. Cf. notes 1 and 16.

If this ever was the law, it has not been such for many years. In a sense it is a reversion to ideas once prevalent, but long since repudiated [6] about the "exclusiveness" of Congress' power over interstate commerce which, if now resurrected for general application, will strike down state taxes in a great variety of forms sustained consistently of late. Not since *Cooley* v. *Board of Wardens*, 12 How. 299, has the notion prevailed that the mere existence of power in Congress to regulate commerce excludes the states from exacting revenue from it through exercise of their powers of taxation.[7] Yet if a general tax, applying to all commerce alike, is to be outlawed, regardless of discriminatory consequences or actual or probable impeding effect in fact, simply because it bears "directly" on the commerce and for no other reason, not only will there be a resurrection of Marshall's "exclusive" idea, never prevailing after the *Cooley* case. The effect will be to knock down many types of state taxes held valid since that landmark decision.[8]

That consequence must follow if the presently asserted basis for decision is to be taken as a principle fit for general application and intended to be so used. We cannot assume that the Court intends it to be used otherwise, for that would be to make of it an arbitrary formula applied to dispose of the present case alone and having no validity for any other situation. But the ground relied upon is broad enough to include many other types of situation

[6] See *e. g.* Ribble, State and National Power Over Commerce (1937) 204; Dowling, Interstate Commerce and State Power (1940) 27 Va. L. Rev. 1, 3–10. See also Frankfurter, The Commerce Clause (1937) 53: "Had Marshall's theory of the 'dormant' commerce power prevailed, the taxable resources of the states would have been greatly confined. The full implications of his theory, if logically pursued, might well have profoundly altered the relations between the state and the central government."

[7] See note 6. See also Wechsler, Stone and the Constitution (1946) 46 Col. L. Rev. 764, 785, quoted in note 10 infra.

[8] Cf. text infra at notes 14 to 16, also 21, and authorities cited.

and of tax, and cannot be restricted logically or in reason to these narrow facts. If discrimination and real risk—in the sense of practical effect to clog or impede trade, are irrelevant to the validity of this type of tax; they are equally irrelevant to many others, unless sheer fiction and arbitrary distinction based on inconsequential factors are to be controlling. If the grounding which disregards them is adequate for disposing of this case, it is adequate also for disposing of many others involving it in which the Court has been at great pains to rest on other factors, unnecessarily it now would seem.

It will be appropriate, before turning to further consideration of the more pertinent decisions, to note the only basis upon which the Court grounds its ruling that "direct" state taxes on "the very process" of interstate commerce are void. This is because, in the words of the opinion, the commerce clause "by its own force created an area of trade free from interference by the States." Although this is stated as grounding for the long established conclusion that even without implementing legislation by Congress the clause is a limitation upon state power, it also is quite obviously the foundation of the further conclusion that "direct" taxes laid by the states within that area are outlawed regardless of any other factor than their direct incidence upon it.

II

I agree that the commerce clause "of its own force" places restrictions upon state power to tax, as well as to regulate, interstate commerce. This has been held through various lines of decision extending back to *Gibbons v. Ogden*, 9 Wheat. 1, some of them unbroken.[9] I

[9] See *e. g.*, *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489; *Real Silk Hosiery Mills* v. *Portland*, 268 U. S. 325; *Nippert* v. *Richmond*, 327 U. S. 416, and authorities cited.

also agree that this construction is consonant with the great purpose of the commerce clause to maintain our distinctively national trade free from state restrictions and barriers against it which the clause was adopted to prevent. But, at any rate since *Cooley* v. *Board of Wardens, supra*, this has not meant that the clause was intended to or could secure "by its own force" that vast area of commercial activity wholly free from "interference," that is, from taxation and regulation, by the states.[10] Nor for many years has it meant that the field of interstate commerce is to be free from such "interference," simply because it is "direct" or has immediate incidence upon it.[11] True, language frequently appears in the cases, especially the earlier ones, to the effect that "direct" taxation and regulation by the states are forbidden. But apart from its inconsistency with both language and results in other cases,[12] in most of those where it has appeared there were other invalidat-

[10] See Ribble, *supra*, at 72 ff.; FRANKFURTER, *supra*, at 24, 56; Wechsler, Stone and the Constitution (1946) 46 Col. L. Rev. 764, 785: "It will summarize his basic conception to say that as the issues were framed in the long debate the position taken by the Court in *Cooley* v. *Board of Wardens* comes closest to according with his thought."

[11] "Experience has taught that the opposing demands that the commerce shall bear its share of local taxation, and that it shall not, on the other hand, be subjected to multiple tax burdens merely because it is interstate commerce, are not capable of reconciliation by resort to the syllogism. Practical rather than logical distinctions must be sought." *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, 259. See also the dissenting opinion of Mr. Justice Stone in *Di Santo* v. *Pennsylvania*, 273 U. S. 34, 44 (overruled by *California* v. *Thompson*, 313 U. S. 109), "In thus making use of the expressions, 'direct' and 'indirect interference' with commerce, we are doing little more than using labels to describe a result rather than any trustworthy formula by which it is reached."

[12] See, *e. g.*, *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33; *Gwin, White & Prince* v. *Henneford*, 305 U. S. 434; *Nippert* v. *Richmond*, 327 U. S. 416.

ing factors, such as singling out the commerce for special treatment, other types of discrimination, or failure to apportion where multiple state taxation could result if the tax were sustained.[13]

[13] Gross receipts taxes which have been sustained fall into the following groups: (a) Those which were fairly apportioned. See, *e. g.*, *Illinois Cent. R.* v. *Minnesota*, 309 U. S. 157; *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18; *Wisconsin & Michigan Ry.* v. *Powers*, 191 U. S. 379; *U. S. Express Co.* v. *Minnesota*, 223 U. S. 335; *Ficklen* v. *Taxing District*, 145 U. S. 1. (b) Those which have been justified on a "local incidence" theory. See, *e. g.*, *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, with which compare *Fisher's Blend Station* v. *Tax Com'n.*, 297 U. S. 650; *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33; *American Mfg. Co.* v. *St. Louis*, 250 U. S. 459. See also cases cited in note 21. In many cases apportioned gross receipts taxes have been sustained not on the ground that they were apportioned but that they were local in nature. See, *e. g.*, *Maine* v. *Grand Trunk Ry.*, 142 U. S. 217; *Erie Railroad* v. *Pennsylvania*, 158 U. S. 431; *Wisconsin & Michigan Ry.* v. *Powers*, *supra*; *U. S. Express Co.* v. *Minnesota*, *supra*.

Gross receipts taxes which have not been sustained fall into the following groups: (a) Those which were not fairly apportioned. See, *e. g.*, *Oklahoma* v. *Wells Fargo Co.*, 223 U. S. 298. (b) Those which were not apportioned and subjected interstate commerce to the risk of multiple taxation. *Philadelphia & So. S. S. Co.* v. *Pennsylvania*, 122 U. S. 326; *Ratterman* v. *Western Union Telegraph Co.*, 127 U. S. 411; *Western Union Telegraph Co.* v. *Alabama*, 132 U. S. 472; *Adams Mfg. Co.* v. *Storen*, 304 U. S. 307; *Gwin, White & Prince* v. *Henneford*, 305 U. S. 434, 439. Cf. *Fargo* v. *Michigan*, 121 U. S. 250, as explained in *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, 256. (c) Those in which there was a discriminatory element in that they were directed exclusively "at transportation or communication," Lockhart, Gross Receipts Taxes on Transportation (1943) 57 Harv. L. Rev. 40, 65–66. *Galveston, H. & S. A. Ry.* v. *Texas*, 210 U. S. 217, and cf. *New Jersey Tel. Co.* v *Tax Board*, 280 U S. 338. But see *Nashville, C. & St. L. Ry.* v. *Browning*, 310 U. S. 362. In both the *Galveston* and *New Jersey Telephone Company* cases, although the taxable events all occurred within the taxing state, the possibility of multiple taxation was nevertheless present. (d) Those in which there was no discrimination but a possible multiple burden. *Fisher's Blend Station* v. *Tax Board*, *supra*, as explained in *Western Live Stock* v.

The fact is that "direct incidence" of a state tax or regulation, apart from the presence of such a factor, has long since been discarded as being in itself sufficient to outlaw state legislation. "Local" regulations, under the *Cooley* formula, bear directly on the commerce itself.[14] But they are not outlawed for that reason. Calling them "incidental," where this is done, does not make them "indirect," except in judicial perspective. Police regulations bear no more indirectly or remotely upon the interstate commerce which must observe them than upon the local commerce falling equally within their incidence.

Again, an apportioned tax on interstate commerce is a "direct" tax bearing immediately upon it in incidence. But such a tax is not for that reason invalid. Decisions have sustained such taxes repeatedly, regardless of their direct bearing, provided the apportionment were fairly made and no other vitiating element were present, such as those above mentioned.[15] It was this fact, without question, which the Court had in mind in the *Adams* case, when it carefully saved from its ban any question concerning such a tax as Indiana's if properly apportioned in a situation like the ones presented there and now.[16]

Bureau of Revenue, 303 U. S. at 260–261. (e) Those in which there was no discrimination, no apportionment and no possibility of multiple burden. *Puget Sound Stevedoring Co.* v. *Tax Commission*, 302 U. S. 90. This decision, it may be noted, might have been rested upon the clause of the Constitution forbidding the states to tax exports. Cf. *Richfield Oil Corp.* v. *California*, No. 46, decided November 25, 1946.

[14] Cf. *California* v. *Thompson*, 313 U. S. 109; *Union Brokerage Co.* v. *Jensen*, 322 U. S. 202; *Robertson* v. *California*, 328 U. S. —. Indeed, sometimes police regulations bear more heavily on interstate commerce. Cf. *Robertson* v. *California*, *supra*, and cases cited at note 28 therein.

[15] See cases cited in note 13, *supra*.

[16] The Court said, in answer to the Indiana Supreme Court's emphasis upon the "generality and nondiscriminatory character" of the levy, "but it is settled that this will not save the tax if it directly burdens interstate commerce." 304 U. S. at 312; cf. note 1, *supra*.

III

The language purporting to outlaw "direct" taxes because they are direct has appeared more frequently perhaps in relation to gross receipts taxes than any other, including both "direct" taxes, apportioned and unapportioned, and others considered "indirect" because purporting to be laid not "on the commerce itself" but upon some "local incident." We have recently held that a tax having effects forbidden by the commerce clause will not be saved merely because it is cast in terms of bearing upon some "local incident." [17] As we then said, all interstate commerce takes place within the states and the consequences forbidden by the commerce clause cannot be achieved legally simply by the device of hooking the tax or other forbidden regulation to some selected "local incident."

The same statement is now made in this case not only to support the conclusion that these features cannot save a tax where the risk of multiple state taxation would outlaw it, as in the *Adams* case, but to support the vastly broader grounding that the tax is invalid simply because it is "direct" in its incidence. The quoted *Adams* statement had no such significance, as appears not only from its immediate context but also from the further statement, made apropos *American Mfg. Co.* v. *St. Louis*, 250 U. S. 459, in an effort to distinguish it: "It is because the tax, forbidden as to interstate commerce, reaches *indiscriminately and without apportionment*, the gross compensation for both interstate commerce and intrastate activities that it must fail in its entirety so far as applied to receipts from sales interstate." (Emphasis added.) 304 U. S. at 314. Not "direct" taxation simply, but taxing the entire proceeds without apportionment in the face of threatened or possible multiple state taxation was the "direct burden" found and outlawed in the *Adams* case.

[17] "If the only thing necessary to sustain a state tax bearing upon interstate commerce were to discover some local incident which might be regarded as separate and distinct from 'the transportation or intercourse which is' the commerce itself and then to lay the tax on that incident, all interstate commerce could be subjected to state taxation and without regard to the substantial economic effects of the tax upon the commerce." *Nippert* v. *Richmond*, 327 U. S. 416, 423.

That such a factor may be chosen for bearing the "direct" incidence of the tax may be a consideration to be taken into account in determining its validity. But it cannot validate a tax or regulation which produces the forbidden consequences, any more than a "direct tax" which does not produce them can be outlawed because it is direct. Not "directness" or "immediacy" of incidence *per se*, whether "upon the commerce itself" or upon a "local incident," is the outlawing factor, but whether the tax, regardless of the special point of incidence, has the consequences for interstate trade intended to be outlawed by the commerce clause.

The difficulty of any other rule or approach is disclosed most clearly perhaps by contrasting the decision in *American Mfg. Co.* v. *St. Louis*, 250 U. S. 459, with the *Adams* decision and this one, in both of which efforts are made, unsuccessfully in my opinion, to distinguish the *American* case. There the tax was laid upon the manufacture, locally done, of goods sold locally and out of state. But the tax was "measured by" the gross receipts from sales of the goods manufactured, including those sold interstate.[18]

[18] To say that this was not in substance a tax on gross receipts, because sales in St. Louis *of goods made elsewhere* were not taken into account in measuring the tax, is simply to ignore the fact that the tax did include all interstate sales of goods manufactured and all returns from them. That the local sales of goods brought in from other states were excepted does not mean either that those sales were interstate transactions (which it was not necessary to decide in view of their exemption) or that the sales out of state included in the measure were not interstate transactions; or that they were not, in substantial effect, taxed upon their gross returns by the measure, notwithstanding the tax was made legally to fall upon the privilege of manufacturing.

The *Adams* decision purported to distinguish *American Mfg. Co.* v. *St. Louis* simply on the ground that the tax was not one laid on the taxpayer's sales or the income derived from them, but was a license fee for engaging in the manufacture which could be measured "by the sales price of the goods produced rather than by their value at the date of manufacture."

A tax upon a local privilege *measured by* the volume of gross receipts from both local and interstate trade [19] would seem to have, in practical effect, the same consequences for blocking or impeding the commerce as one laid "directly" upon it certainly in any situation where no multiple levy is made, likewise in any where more than one state might find such a local privilege for pegging the tax.[20] And a tax upon gross receipts "in lieu of" property or other taxes [21] cannot be said either to be less "direct" in its incidence upon the commerce than the application of the Indiana tax now in issue or to afford protection against multiple levies the risk of which was held in *Adams Mfg. Co.* v. *Storen* to make the Indiana tax inherently vicious in that application.[22]

Unless we are to return to the formalism of another day, neither the "directness" of the incidence of a tax "upon the commerce itself" nor the fact that its incidence is manipulated to rest upon some "local incident" of the interstate transaction can be used as a criterion or, many times, as a consideration of first importance in determining the validity of a state tax bearing upon or affecting interstate commerce. Not the words "direct" and "indirect" or "local incident" can fulfill the function of judgment in deciding

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[19] In addition to *American Mfg. Co.* v. *St. Louis*, 250 U. S. 459; see *Oliver Iron Co.* v. *Lord*, 262 U. S. 172; *Hope Natural Gas Co.* v. *Hall*, 274 U. S. 284; *Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165.

[20] Cf. *Galveston, C. & St. L. Ry* v. *Texas*, 210 U. S. 217, 227; Morrison, State Taxation of Interstate Commerce (1942) 36 Ill. L. Rev. 727, 738.

[21] See *Postal Telegraph-Cable Co.* v. *Adams*, 155 U. S. 688; *U. S. Express Co.* v. *Minnesota*, 223 U. S. 335; *Pullman Co.* v. *Richardson*, 261 U. S. 330. See also discussion in *Galveston, C. & St. L. Ry.* v. *Texas*, 210 U S. 217, 226–227.

[22] This is true, though concededly such a tax might work to prevent cumulative or higher tax burdens imposed by a single taxing state. Cf. Lockhart, Gross Receipts Taxes on Interstate Transportation and Communication (1943) 57 Harv. L. Rev. 40.

whether the tax brings the forbidden results. See the dissenting opinion of Mr. Justice Stone in *Di Santo* v. *Pennsylvania*, 273 U. S. 34, 44, quoted in note 11. That can be done only by taking account of the specific effects of state legislation the clause was intended to outlaw, and of the consequences actual or probable of the legislation called in question to create them.

IV

Judgments of this character and magnitude cannot be made by labels or formulae. They require much more than pointing to a word. It is for this reason that increasingly with the years emphasis has been placed upon practical consequences and effects, either actual or threatened, of questioned legislation to block or impede interstate commerce or place it at practical disadvantage with the local trade.[22] Formulae and adjectives have been retained at times in intermixture with the effective practical considerations. But proportionately the stress upon them has been greatly reduced, until the present decision; and the trend of recent decisions to sustain state taxes formerly regarded as invalid has been due in large part to this fact.

The commerce clause was not designed or intended to outlaw all state taxes bearing "directly" on interstate commerce. Its design was only to exclude those having the effects to block or impede it which called it and the Constitution itself into being. Not all state taxes, nor indeed all *direct* state taxes, can be said to produce those effects. On the other hand, many "indirect" forms of state taxation, that is, "indirect" as related to "incidence," do in fact produce such consequences and for that reason are invalid.

[22] See *Nippert* v. *Richmond*, 327 U. S. 416; *Best & Co.* v. *Maxwell*, 311 U. S. 454. Cf. *Prudential Ins. Co.* v. *Benjamin*, 328 U. S. —. See also Wechsler, Stone and the Constitution (1946) 46 Col. L. Rev. 764, 785–787.

It is for this reason that selection of a "local incident" for hanging the tax will not save it, if also the exaction does not in fact avoid the outlawed interferences with the free flow of commerce. Selection of a local incident for pegging the tax has two functions relevant to determination of its validity. One is to make plain that the state has sufficient factual connections with the transaction to comply with due process requirements.[24] The other is to act as a safeguard, to some extent, against repetition of the same or a similar tax by another state.[25] These matters are often interrelated, cf. *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1, though in other situations they may be entirely separate. The important difference is between situations where it is essential to show minimal factual connections of the transaction with the taxing state in order to sustain the levy as against due process objections for "want of jurisdiction to tax"; [26] and other situations where, although such connections clearly are present, the necessity is for showing that the tax, if sustained, will create a multiple tax load or other consequences having the forbidden effects.

This case is not one of the former sort. The transactions were as closely connected in fact with Indiana as with any other state.[27] But the case is one of the latter

[24] See dissenting opinion in *McLeod* v. *Dilworth*, 322 U. S. 327 at 356–357. See also *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 444–445.

[25] See McNamara, Jurisdictional and Interstate Commerce Problems in the Imposition of Excises on Sales (1941) 8 Law & Contemp. Prob. 482, 491. Compare the discussion of a proposed federal statute to give the buyer's state the right to impose nondiscriminatory sales taxes. Proc. 27th Ann. Conf. Nat. Tax Assn. (1934) 136–160. See also Perkins, The Sales Tax and Transactions in Interstate Commerce (1934) 12 N. C. L. Rev. 99.

[26] Cf. note 25.

[27] Indiana was the state by whose law the trust was created. It was the *situs* of the trust's administration. It was the place where the securities were kept prior to mailing for delivery in accordance with

type, that is where, despite those connections, there were equally close and important ones in another state, New York; and therefore, as the *Adams* case declared, the risk of multiple state taxation would be incurred, unless one or the other or both states were forbidden to tax the transaction as such, or were required to apportion the tax. Not the "directness" of the tax in its bearing upon the commerce, but this danger is the crucial issue in this case, as it was in the *Adams* case. In other words, but for the possibility that more states than one would levy the same or a similar tax, such an application as was made of Indiana's tax in the *Adams* case and here would be no more burdensome or objectionable than other applications of the same tax this Court has sustained or of other taxes likewise held valid.[28]

V

This Court has gone far in sustaining state taxes laid upon local incidents of interstate transactions by both the state of origin and the state of the market in recent years.[29]

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the terms of their sale. Cf. *Curry* v. *McCanless*, 307 U. S. 357. The directions for sale were given there. The proceeds were forwarded to Indiana and there received into the corpus of the trust. The state's connections with the trust, and with the property which was the subject of the sale, more than satisfy any due process requirement for exercise of the power to tax either the property or transactions relating to its disposition taking place as largely within Indiana's borders as did the sales in this case.

[28] The cases, aside from *Adams Mfg. Co.* v. *Storen*, 304 U. S. 307, which involve the Indiana gross receipts tax are: *Department of Treasury* v. *Wood Preserving Corp.*, 313 U. S. 62; *Department of Treasury* v. *Ingram-Richardson Mfg. Co.*, 313 U. S. 252; *International Harvester Co.* v. *Dept. of Treasury*, 322 U. S. 340; *Ford Motor Co.* v. *Dept. of Treasury*, 323 U. S. 459. See also *General Trading Co.* v. *State Tax Commission*, 322 U. S. 335; cf. *Northwestern Airlines* v. *Minnesota*, 322 U. S. 292.

[29] See, *e. g.*, *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33; *Nelson* v. *Sears, Roebuck & Co.*, 312 U. S. 359; *General Trading Co.* v. *Tax*

Perhaps it may be said, in view of such decisions, that it has more clearly sustained such taxes at the marketing end than by the state of origin,[30] although this may be matter for debate. In any event, the factual connections of the taxing state with the interstate transaction in the cases where the tax has been sustained hardly can be regarded as greater or more important than those of Indiana with the transactions involved in the *Adams* case and here. Nor could it be shown in fact that in some of them, at any rate, the danger of multiple state taxation was appreciably less, if it be assumed that the forwarding state has the same power to tax the transaction, by pegging the tax upon a local incident, as has been recognized for the state of market.

Such taxes, whether in one state or the other, may in fact block or impede interstate commerce as much as, or more than, one placed directly upon the commerce itself. They have been sustained, nevertheless, not simply because of their bearing upon a local incident, but because in the circumstances of their application they were considered to have neither discriminatory effects upon interstate trade as compared with local commerce nor to impose upon it the blocking or impeding effects which the commerce clause was taken to forbid.[31]

This in my judgment is the appropriate criterion to be applied, rather than any mere question of "direct" or "indirect" incidence upon a "local incident." The absence of any such connection with the taxing state is highly

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Commission, 322 U. S. 335; *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250; *Coverdale* v. *Arkansas-Louisiana Pile Line Co.*, 303 U. S. 604; *Department of Treasury* v. *Ingram-Richardson Mfg. Co.*, 313 U. S. 252.

[30] Compare *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33, with *McLeod* v. *Dilworth*, 322 U. S. 327. See Powell, New Light on Gross Receipts Taxes (1940) 53 Harv. L. Rev. 909.

[31] See *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33, 58, quoted *infra* Part VI.

material.[32] Its presence cannot be the controlling consideration for validating the tax. *Nippert* v. *Richmond*, 327 U. S. 416. In this view it would seem clear that the validity of such a tax as Indiana's, applied to situations like those presented in the *Adams* case and now, should be determined by reference not merely to the "direct incidence" of the tax, but by whether those forbidden consequences would be produced, either through the actual incidence of multiple taxes laid by different states or by the threat of them, with resulting uncertainties producing the same impeding consequences.[33]

Thus, it is highly doubtful that the levy in this case, or in the *Adams* case, actually had any impeding effect whatever upon the transactions or the free flow interstate of such commerce.[34] But the *Adams* case found the impediment in the assumption that if one state could tax, so also could the other, and in that event, a double burden would result for interstate commerce not borne by local trade. This danger, it was said, was inherent in the type of the tax, since it was not apportioned, and in consequence the tax as applied must fall.

The basic assumption was not true as a universally or even a generally resulting consequence, for two reasons.

[32] As a matter of minimal due process requirements. Cf. text *infra* at notes 24 to 27.

[33] The danger of an impending burden or barrier from multiple state taxation could be real and substantial in a particular case if the threat of such taxation were actual or probable or if its threatened incidence were involved in such actual uncertainty that this uncertainty itself would constitute, in practical effect, a substantial clog.

[34] The Indiana tax was only one per cent of the proceeds of the sales. The record indicates, too, that the New York Stock Transfer tax was collected from the proceeds of the sale in New York. The amount of the tax was three cents per share sold for less than twenty dollars, and four cents per share sold for more than twenty dollars. Tax Law §§ 270, 270a; *O'Kane* v. *New York*, 283 N. Y. 439. The tax did not apply to the transfer of bonds. Cf. Op. Atty. Gen. N. Y. 1939, p. 208.

One is that it would not follow necessarily as a matter of fact that both states would tax or, if they did so, that the combined effects of the taxes would be either to clog or to impede the commerce.[35] The other, it no more follows, as a matter of law, that because one state may tax the other may do likewise.

The *Adams* decision did not take account of any difference, as regards the risk of multiple state taxation, between situations where the multiple burden would actually or probably be incurred in fact and others in which no such risk would be involved. It rather disregarded such differences, so that "the risk of double tax burden" on which the Court relied to invalidate the levy was not one actually, probably, or even doubtfully imposed in fact by another state.[36] It rather was one which resulted only from an assumed, and an unexercised, power in that state to impose a similar tax.

The Court was not concerned with whether the forbidden consequences had been incurred in the particular situation or might not be incurred in others covered by its ruling. The motivating fear was more general. The ultimate risk which the Court sought to avoid was the danger that gross income or gross receipts tax legislation, without apportionment, might be widely adopted if the door were once opened and, if adopted and applied to interstate sales by all or many of the states, would result generally in bringing such sales within the incidence of

[35] Cf. note 31. Whether such a tax would in fact produce the forbidden results or not would depend upon the incidence or likelihood of the incidence of a like tax in the other, or another, jurisdiction having similar power. Frequently this likelihood will be, in fact, either nil or small.

[36] The opinion discloses no consideration of any question or suggestion whether a like or other tax had been or was likely to be imposed by the state of destination, or even that such a tax by that state was doubtfully incident. Such an inquiry would have been inconsistent with the Court's thesis.

multiple state taxation of that nature. Rather than incur this risk, with the anticipated consequent widespread creation of multiple levies, the Court in effect forestalled them at the source. Its action was prophylactic and the prophylaxis was made absolute.

By thus relieving interstate commerce from liability to pay taxes in either state, without any showing that both had laid them, the effect was, not simply to relieve that commerce from multiple burden, but to give it exemption from taxes all other trade must bear.[37] Local trade was thus placed at disadvantage with interstate trade, by the amount of the tax, and the commerce clause thereby became a refuge for tax exemption, not simply a means of protection against unequal or undue taxation. Certainly its object was not to create for interstate trade such a specially privileged position.

But the alternatives to such a ruling were not themselves free from difficulty. They may be stated shortly. But preliminarily, I accept the view frequently declared [38] that a state runs afoul the commerce clause when it singles out interstate commerce for special taxation not applied to other trade or otherwise discriminates against it or treats it invidiously. Moreover, all other things being equal, multiple state taxation of gross receipts, although by nondiscriminatory taxes of general applicability, does compel the latter to bear a heavier tax burden than local trade in either state. The cumulative tax burden is in effect discriminatory, involving in any practical view the exact effects of a single discriminatory tax. Although the difference in total tax load may not be sufficient actually to

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[37] It is assumed, of course, that a nondiscriminatory tax of general applicability laid by the taxing state would be involved.

[38] See *Best & Co.* v. *Maxwell*, 311 U. S. 454; *Hale* v. *Bimco Trading Co.*, 306 U. S. 375; *Guy* v. *Baltimore*, 100 U. S. 434; *Webber* v. *Virginia*, 103 U. S. 344; *Welton* v. *Missouri*, 91 U. S. 275; *Voight* v. *Wright*, 141 U. S. 62; *Brimmer* v. *Rebman*, 138 U. S. 78.

block or impede the free flow of interstate trade,[39] discrimination alone, without regard to showing of further consequences, has been held consistently to be sufficient for outlawing the tax.

This too I accept. For discrimination not only is ordinarily itself invidious treatment, but has an obvious tendency toward blocking or impeding the commerce, if not always the actual effect of doing so. Nor is the discriminatory tendency or effect lessened because it results from cumulation of tax burdens rather than from a single tax producing the same consequence. To allow both states to tax "to the fullest extent" would produce the invidious sort of barrier or impediment the commerce clause was designed to stop. But the bare power of another state to tax unexercised does not produce such results. It only opens the way for them to be produced. This danger is not fanciful but real, more especially in a time when new sources of revenue constantly are being sought. Accordingly, I agree that this door should not be opened.

But it is not necessary to go as far as the *Adams* case went, or as the decision now rendered goes, in order to prevent the anticipated deluge. There is no need to give interstate commerce a haven of refuge from taxation, albeit of gross receipts or from "direct" incidence, in order to safeguard it from evils against which the commerce clause is designedly protective. Less broad and absolute alternatives are available and are adequate for the purpose of protection without creating the evils of total exemption.

The alternative methods available for avoiding the multiple state tax burden may now be stated. They are: (1) To apply the *Adams* ruling, stopping such taxes at

[39] For a variety of reasons, among which might be the larger capacity of such trade to absorb the difference, by reason of greater volume, without sustaining loss of profit, in the particular sort of commerce or type of transaction. See also note 34.

the source, unless the tax is apportioned, thus eliminating the cumulative burdens;[40] (2) To rule that either the state of origin or the state of market, but not both, can levy the exaction; (3) To determine factually in each case whether application of the tax can be made by one state without incurring actual danger of its being made in another or the risk of real uncertainty whether it will in fact be so made.

The *Adams* solution is not unobjectionable, for reasons already set forth. To deprive either state, whether of origin or of market, of the power to lay the tax, permitting the other to do so has the vice of allowing one state to tax but denying this power to the other when neither may be as much affected by the deprivation as would be the one allowed to tax and, in any event, both may have equal or substantial due process connections with the transaction. The solution by factual determination in particular cases of the actual or probable incidence of both taxes is open to two objections. One is that to some extent it would make the taxing power of one or both states depend upon whether the other had exercised, or probably would exercise, the same power. The other would lie in the volume of litigation such a rule would incite and the difficulties, in some cases at least, of making the factual determination.

VI

The problem of multiple state taxation, absent other factors making for prohibition, is therefore one of choosing among evils. There is no ideal solution. To leave the

[40] The *Adams* decision, of course, made no direct ruling upon an actual tax laid by the state of destination. But the basic premise of its rationalization would be altogether without substance if it were taken to mean that such a tax could be levied there without meeting the same barrier, and for the same reason, as the tax levied by Indiana, the state of origin, encountered.

matter to Congress, allowing both states to tax "to the fullest extent" until it intervenes, would run counter to the long-established rules not only requiring apportionment where incidence of multiple taxes would be likely, but also in substance and effect to those forbidding discrimination, without the consent of Congress, cf. *Prudential Life Ins. Co.* v. *Benjamin*, 328 U. S. —, as well as the long settled rule that the clause is "of its own force" a prohibition upon the states. To require factual determination of forbidden effects in each case would be to invite costly litigation, make decision turn in some cases, perhaps many, on doubtful facts or conclusions, and encourage the enactment of legislation involving those consequences. The *Adams* ruling, as I have said, creates for many situations a tax refuge for interstate commerce and does this in both states.

As among the various possibilities, I think the solution most nearly in accord with the commerce clause, at once most consistent with its purpose and least objectionable for producing either evils it had no design to bring or practical difficulties in administration, would be to vest the power to tax in the state of the market, subject to power in the forwarding state also to tax by allowing credit to the full amount of any tax paid or due at the destination. This too is more nearly consonant with what the more recent decisions have allowed, if full account is taken of their effects.

In *McLeod* v. *Dilworth*, 322 U. S. 327, 361, I have set forth the reasons leading to this conclusion.[41] It may be added that such a result would avoid altogether the undesirable features of factual determination in each case; would prevent the multiple and, in effect, discriminatory burden which would follow from allowing both states to tax until Congress should intervene; and would reduce by

[41] "If in this case it were necessary to choose between the state of origin and that of market for the exercise of exclusive power to tax, or

half, at least, the tax refuge created by the *Adams* ruling, without incurring other outlawed effects.

It is true this view logically would deny the state of origin power to tax, notwithstanding its adequate due process connections, except by giving credit for taxes due at the destination.[42] But the forwarding state has no greater power under the *Adams* ruling and none at all under the present one if it is to be applied consistently and, as I think, this can be taken to outlaw both unapportioned and apportioned taxes.

I have no doubt that under the law prevailing until now this tax would have been sustained, if apportioned, under the *Adams* decision and others.[43] Nor have I any question that such a tax laid by New York would be upheld under those decisions. Indeed, in my opinion, the necessary effect of *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33, as appellee asserts, is to sustain power in the state of the market to tax "to the fullest extent" without apportionment by nondiscriminatory taxes of general applicability, transactions essentially no different from the ones involved in this case and in the *Adams* case.

It is true the *Berwind-White* case purported to distinguish the *Adams* case. But it did so by pointing out that the *New York* tax was "conditioned upon a local

for requiring allowance of credit in order to avoid the cumulative burden, in my opinion the choice should lie in favor of the state of market rather than the state of origin. The former is the state where the goods must come in competition with those sold locally. It is the one where the burden of the tax necessarily will fall equally on both classes of trade. To choose the tax of the state of origin presents at least some possibilities that the burden it imposes on its local trade, with which the interstate traffic does not compete, at any rate directly, will be heavier than that placed by the consuming state on its local business of the same character."

[42] Credit allowed for taxes paid elsewhere, see *Henneford* v. *Silas Mason Co.*, 300 U. S. 577; *General Trading Co.* v. *Tax Commission*, 322 U. S. 335, is a form of apportionment, though not the only one.

[43] See also *Gwin, White & Prince* v. *Henneford*, 305 U. S. 434.

incident, delivery of the goods within the State upon their purchase for consumption" and that "the effect of the tax, even though measured by the sales price, as has been shown, neither discriminates against nor obstructs interstate commerce more than numerous other state taxes which have been repeatedly sustained as involving no prohibited regulation of interstate commerce." 309 U. S. 33, 58.

This comes down to sustaining the tax, as was done in *American Mfg. Co.* v. *St. Louis*, *supra*, relied to distinguish the *Adams* case, simply because the tax was pegged upon the "local incident" of delivery. Apart from the reasons I have set forth above for regarding this as not being controlling, that basis was flatly repudiated in *Nippert* v. *Richmond*, 327 U. S. 416, as adequate for sustaining a tax having otherwise the forbidden effects and features. So here, in my opinion, it is hardly adequate to distinguish the *Adams* case, leaving it unimpaired, or to differentiate consistently the broader ruling made in this case.

I therefore agree with the appellee that the effect of the *Berwind-White* ruling was in substance, though not in words, to qualify the *Adams* decision, and that the combined effect of the two cases, taken together, was to permit the state of the market to tax the interstate transaction, but to deny this power to the forwarding state, unless by credit or otherwise it should make provision for apportionment. See Powell, New Light on Gross Receipts Taxes (1940) 53 Harv. L. Rev. 909, 939. Whether or not such a provision would save the Indiana tax as now applied, in view of what I think was the effect of *Berwind-White* on any basis other than sheer formalism, need not now be considered.[43]

[43] It is obvious that an apportioned tax laid by the forwarding state, taken in conjunction with an unapportioned one levied by the state of

Whether or not acknowledgment of this effect of the *Berwind-White* decision would require reconsideration of the validity of apportioned taxes otherwise than by full credit, laid by the forwarding state,[45] neither that fact nor the effect of *Berwind-White* in qualifying the *Adams* ruling justifies the broader ruling now made to reach the same result as the *Adams* case reached. The trend of recent decisions has been toward sustaining state taxes formerly regarded as outlawed by the commerce clause. The present decision, by its reversion to the formal and discarded grounding in the "direct incidence" of the tax is a reversal of that trend. It is one, moreover, unnecessary for sustaining the result the Court has reached. Its consequence, if followed in logical application to apportioned taxes, will be to outlaw them, for they bear as "directly" on "the commerce itself" as does the tax now outlawed in its present application. So also does the type of tax sustained in the *Berwind-White* case, in everything but verbalism.

I think the result now reached is justified, as necessary to prevent the cumulative and therefore discriminatory tax burden which would rest on or seriously threaten interstate commerce if more than one state is allowed to impose the tax, as does Indiana, upon the gross receipts from the sale without apportionment or credit for taxes validly imposed elsewhere. This result would follow in view of

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the market, would produce the effect of multiple state levies, to the extent of the apportioned tax unless the apportionment were made by giving full credit for the other tax. In the latter event, of course, there would be no effect of multiple burden in the sense forbidden by the rule requiring apportionment and sustaining properly apportioned taxes. In the absence of a credit to the full amount of the marketing state's tax, the apportioned tax of the forwarding state, although making a cumulative burden, would impose only a reduced one as compared with an unapportioned tax by that state.

[45] Cf. note 44.

the *Berwind-White* decision and others like it,[46] if not only the state of the market but also the forwarding state could tax the sale "to the fullest extent" upon the gross receipts from it. For this reason I concur in the result.

But in doing so I dissent from grounding the decision upon a foundation which not only will outlaw properly apportioned taxes, thus going beyond the *Adams* decision, unless the Court is merely to reiterate the rule forbidding "direct" taxation of interstate sales only to recall it when a case involving a properly apportioned tax shall arise; but also will require outlawing many other types of tax heretofore sustained, unless a similar retreat is made.

[46] See the "use tax" cases: *General Trading Co.* v. *Tax Commission*, 322 U. S. 335; *Felt & Tarrant Mfg. Co.* v. *Gallagher*, 306 U. S. 62; *Nelson* v. *Sears, Roebuck & Co.*, 312 U. S. 359; *Nelson* v. *Montgomery Ward & Co.*, 312 U. S. 373. See also *Jagels* v. *Taylor*, 309 U. S. 619, discussed in *McNamara*, *supra*, note 25, at 487.

SUPREME COURT OF THE UNITED STATES

No. 3.—October Term, 1946.

Almira G. Freeman, as Successor, Trustee Under the Will and of the Estate of Henry C. Starr, Deceased, Appellant. *v.* Gilbert K. Hewit, Director of Gross Income Tax Division, Department of Treasury, State of Indiana.	Appeal from the Supreme Court of the State of Indiana.

[December 16, 1946.]

Mr. Justice Douglas, with whom Mr. Justice Murphy concurs, dissenting.

I think the Court confuses a gross receipts tax on the Indiana broker with a gross receipts tax on his Indiana customer. *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434, would hold invalid a gross receipts tax, unapportioned, on the broker. In that case, the taxpayer was a marketing agent for fruit growers in the State of Washington. The agent made sales and deliveries of the fruit in other States and in foreign countries, collected the sales prices, and remitted the proceeds, less charges, to the customers. The Court held that the gross receipts tax, being unapportioned, was invalid. There are two reasons why that result followed. In the first place, as the Court stated at p. 437, "the entire service for which the compensation is paid is in aid of the shipment and sale of merchandise" in interstate or foreign commerce. "Such services are within the protection of the commerce clause". In the second place, as the Court stated at p. 439, "If Washington is free to exact such a tax, other states to which the commerce extends may, with equal right, lay a tax similarly measured for the privilege of conducting within their respective territorial limits the activities there which con-

tribute to the service. The present tax, though nominally local, thus in its practical operation discriminates against interstate commerce, since it imposes upon it, merely because interstate commerce is being done, the risk of a multiple burden to which local commerce is not exposed."

Under that view a tax on the commissions of the Indiana broker would be invalid. But I see no more reason for giving the customer immunity than I would for giving immunity to the fruit growers who sold their fruit through the broker in *Gwin, White & Prince Inc.* v. *Henneford*, *supra*.

Concededly almost any local activity could, if integrated with earlier or subsequent transactions, be treated as parts of an interstate whole. In that view *American Mfg. Co.* v. *St. Louis*, 250 U. S. 459, would find survival difficult. For in that case a state tax on a manufacturer was upheld though the tax was measured by the value of the goods manufactured within the State and thereafter sold in interstate commerce. In *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, a tax laid on the gross receipts of a trade journal published in New Mexico was sustained although out-of-state advertisements were included in the journal and there was interstate distribution of it. The Court treated the local business as separate and distinct from the transportation and intercourse which are interstate commerce and which were employed to conduct the business.

I think the least that can be said is that the local transactions or activities of this taxpayer can be as easily untangled from the interstate activities of his broker.

Any receipt of income in Indiana from out-of-state sources involves, of course, the use of interstate agencies of communication. That alone, however, is no barrier to its taxation by Indiana. *Western Live Stock* v. *Bureau of Revenue*, *supra*. Cf. *New York ex rel Cohn* v. *Graves*, 300

U. S. 308. The receipt of income in Indiana, like the delivery of property there, *International Harvester Co.* v. *Dept. of Treasury*, 322 U. S. 340, is a local transaction which constitutionally can be made a taxable event. For a local activity which is separate and distinct from interstate commerce may be taxed though interstate activity is induced or occasioned by it. *Western Live Stock* v. *Bureau of Revenue*, *supra*, p. 253. The management of an investment portfolio with income from out-of-state sources is as much a local activity as the manufacture of goods destined for interstate commerce. *American Mfg. Co. v. St. Louis*, *supra*, the publication of a trade journal with interstate revenues, *Western Live Stock* v. *Bureau of Revenue*, *supra*, or the growing of fruit for interstate markets, *Gwin, White & Prince Inc.* v. *Henneford*, *supra*. All such taxes affect in some measure interstate commerce or increase the cost of doing it. But, as we pointed out in *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33, 48, that is no constitutional obstacle.

Adams Mfg. Co. v. *Storen*, 304 U. S. 307, is different. In that case the taxpayer had its factory and place of business in Indiana and sold its products in other States on orders taken subject to approval at the home office. The Court thought the risk of multiple taxation was real, because of the interstate reach of the taxpayer's business activities. The fact is that the incidence of that tax was comparable to the incidence of an unapportioned tax on interstate freight revenues.

The present tax is not aimed at interstate commerce and does not discriminate against it. It is not imposed as a levy for the privilege of doing it. It is not a tax on interstate transportation or communication. It is not an exaction on property in its interstate journey. It is not a tax on interstate selling. The tax is on the proceeds of the sales less the brokerage commissions and therefore does not reach the revenues from the only interstate activities

involved in these transactions. It is therefore essentially no different, so far as the Commerce Clause is concerned, from a tax by Indiana on the proceeds of the sale of a farm or other property in New York where the mails are used to authorize it, to transmit the deed, and to receive the proceeds.

I would adhere to the philosophy of our recent cases[1] and affirm the judgment below.

[1] Of which *Gwin, White & Prince, Inc.* v. *Henneford, supra*, *Western Live Stock* v. *Bureau of Revenue, supra*, and *Mc-Goldrick* v. *Berwind-White Coal Mining Co., supra*, are illustrative.